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Supreme Court, U.S.
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No. 02-283

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

ASSOCIATION OF CIVILIAN TECHNICIANS, INC.,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REVIEWABILITY OF THE DECISION

The government's assertion, Resp. Br. at 7, that 5 U.S.C. § 7123 "preclude[s] judicial review" of bargaining unit consolidation decisions is contradicted by the government's admission, Resp. Br. at 7, that § 7123 *allows* judicial review of these decisions. The government's attempt to escape this contradiction--by asserting that § 7123 precludes "direct," but not "indirect," review, Resp. Br. at 7--is incompatible with the legal standard governing preclusion of review. Nothing in the text or legislative history of § 7123 provides "clear and convincing evidence," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), that Congress intended review to be "indirect," but not "direct." The text and legislative history do not use these terms. They state that one form of appellate review is precluded, but do not say whether any other form of review is precluded or allowed. They provide no clear and convincing evidence for concluding that "indirect" appellate review is allowed, but "direct" district court review is precluded.

Because § 7123 *allows* judicial review of bargaining unit consolidation decisions, the forms of review available are governed by 5 U.S.C. §§ 703-704. Under §§ 703-704, the availability of indirect appellate review through unfair labor practice proceedings does not foreclose district court review because (1) Congress did not expressly provide that judicial review of unit consolidation decisions should be through unfair labor practice proceedings; (2) it is undisputed that unfair labor practice review of decisions denying union requests for unit consolidation is inadequate; and (3) district court review of these decisions would not be disruptive. *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988); *Block*

v. Community Nutrition Institute, 467 U.S. 340, 348 (1984).

The government's brief, at 8, erroneously relies on *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). There, the legislative history expressly stated the form of judicial review that Congress intended be used for the particular action in question, and stated reasons why other forms should not be used. 376 U.S. at 478-79. The government, Resp. Br. at 8, also erroneously relies on *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 133 (1987). In that case, the Court held that Congress intended there to be no judicial review at all of the agency action at issue.

REVIEWABILITY OF STATUTORY INTERPRETATIONS

The government overlooks that agency announcement of a legal interpretation--whether in a regulation, an opinion, or "informal contexts such as letters," *Crowley Caribbean Transport, Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994)--is "agency action" subject to review under 5 U.S.C. §§ 702 and 704. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 783 F.2d 237, 247-48, 251 (D.C. Cir. 1986) (*Brock*) ("an agency may choose to announce interpretations through adjudications rather than through rulemakings"; the interpretation, itself, is "agency action" subject to review, even if the interpretation is announced in an unreviewable decision).

Whether a legal interpretation is reviewable "agency action" does not depend on whether the interpretation addresses a procedural, substantive, statutory, or

constitutional issue. Nothing supports the government's suggestion, Resp. Br. at 10-11, that a substantive statutory interpretation may not be reviewed. In *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 484 (1991), the Court held statutory interpretations subject to review. In *Brock*, the court reviewed substantive statutory interpretations. If substantive statutory interpretations are reviewable when announced in agency regulations, they are reviewable when announced in other agency documents. *Crowley*; *Brock*.

The government erroneously argues, Resp. Br. at 10, that review of substantive statutory interpretations announced in unreviewable agency decisions is foreclosed by *Interstate Commerce Comm'n v. Brhd of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987). There, the Court rejected "the principle that if the agency gives a reviewable reason for otherwise unreviewable action, *the action* becomes reviewable." (Emphasis added.) Review of an interpretation announced in a decision, however, is not review of the decision. A declaration invalidating the interpretation does not vacate the decision. Standing to challenge the interpretation depends not on whether one was a party in the case that produced the decision, but on whether the legal interpretation has a prospective impact, such as an impact on possible future proceedings, that makes declaratory relief appropriate. Pet. Cert. at 8-9, n. 7.

The union here has standing to seek declaratory relief because the agency decision does not prohibit the union from filing a new unit consolidation petition. A judicial declaration invalidating one or both of the statutory interpretations that the agency announced would aid the union's pursuit of a new petition, thus making declaratory relief appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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